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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1431 200

BLUE CAB COMPANY AND VILLAGE CAB COMPANY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners, Blue Cab Company and Village Cab Company, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on February 7, 1967.

OPINIONS BELOW.

The opinion of the court of appeals is not yet officially reported, but is printed in Appendix A at pages 11-18. The Board's decision and order (J. A. 284-329)[1] is reported at 156 N. L. R. B. 489.

1. "J. A." refers to the joint appendix in the court below; copies have been filed with the petition.

JURISDICTION.

The judgment of the court of appeals was entered on February 7, 1967. Rehearing was denied on March 2, 1967. This Court has jurisdiction under 28 U. S. C. 1254 (1) and Sections 10 (e) and 10 (f) of the National Labor Relations Act (29 U. S. C. 160 (e) and (f)).

QUESTIONS PRESENTED.

Whether the National Labor Relations Board has the power to require the parties to a collective bargaining agreement to continue to give effect to the agreement after it has been terminated by the parties.

Whether it is a refusal to bargain collectively, in violation of Section 8 (a) (5) of the National Labor Relations Act, for an employer to change unilaterally the price charged the public for its goods or services when the compensation of its employees is based in part upon the employer's sales.

Whether the court of appeals erred in limiting its review of the National Labor Relation Board's finding as to the nature of the work stoppage to a determination of whether this finding was supported by substantial evidence.

STATUTE INVOLVED.

The relevant statutory provisions are set forth in Appendix B, *infra*, pp. 21-22.

STATEMENT.

The Blue Cab Company and Village Cab Company (hereinafter referred to as the "Companies") are in the business of operating taxicabs under franchises from the Village of Oak Park, a suburb of Chicago (J. A. 20). Both

Companies are run primarily by Charles Ugaste and both share common facilities and supervisory staffs at the same location (J. A. 7, 18, 20-21).

For eleven years the Companies had bargained with the Union[2] and the resulting collective bargaining agreements were substantially identical for each bargaining unit (J. A. 24). The most recent contracts were to remain in effect through June 30, 1963, and from year to year thereafter, unless at least 60 days prior to that date or any subsequent June 30, either party served written notice of its desire to amend or terminate the agreements (J. A. 297, 251-257, 258). On January 21, 1963, the Companies, by their attorneys, notified the Union in writing of their intent to terminate the agreements on June 30, 1963 (J. A. 290-291, 297-298, 29, 105-106, 260, 261). Prior to this time, Charles Ugaste had had many discussions with Mr. Baggot and other Union representatives as to the possibility of working out some arrangement other than that which was then in effect (J. A. 29, 38, 226). The Union did not respond to this notice until April 23 when it asked the Companies to begin negotiations (J. A. 262, 263). On April 29, the Companies replied (again through their attorneys) that although they considered the contracts terminated as of June 30, 1963, they would "be glad to discuss with [the Union], at any time or place that is mutually convenient, any phases of the working conditions and wages . . . which concern [the Union]." (J. A. 268.)

In the middle of May, Charles Ugaste met with John Baggot, business agent of the Union, at the latter's request (J. A. 31-32, 134). At this meeting, Ugaste stated that because he was losing money, he intended to cease operating taxicabs and begin to lease them (J. A.

2. General Teamsters, Chauffeurs and Helpers, Local Union No. 782, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

36, 107). Baggot's answer to this was that he heard the same claim every time he negotiated a contract (J. A. 134).

On May 27, 1963, the Union wrote the Federal Mediation and Conciliation Service, giving notice that it had an unresolved labor dispute with the Companies (J. A. 276; 120). On June 24, the Companies met with the Union under the auspices of the Federal Mediation and Conciliation Service, but their attendance was under protest as they contested the jurisdiction of federal agencies over the dispute (J. A. 299, 305; 74-75, 122-123).

After this meeting, the membership met and voted to go out on strike if no contract was signed by June 30th (J. A. 123).

The next meeting between the parties was arranged for by the Oak Park Chief of Police and took place at the Village Hall on June 28th (J. A. 124). At this meeting, Charles Ugaste proposed that the drivers take a reduction in their share of the fares to 42.5 percent and that they be required to secure a bond of one hundred dollars for accidents (J. A. 124). Ugaste also stated that the Companies planned to reduce the basic fare from 40 to 30 cents per mile (J. A. 124).

The following day, there was another meeting at the Village Hall, attended by some of the drivers. Mr. Ugaste repeated his offer of 42.5 percent, but the drivers at the meeting rejected it (J. A. 98-99). Instead, they offered to cut the drivers' share of the fares to 43.5 percent, with no change in the other benefits they were then receiving and no bonding requirement (J. A. 98-99). Mr. Ugaste rejected this proposal (J. A. 99).

At Midnight on June 30, 1963, the moment the contract expired, the drivers struck and began picketing. On July 1, the Companies began leasing the cabs and reduced the meter rate from 40 to 30 cents per mile, a reduction which

is still in effect (J. A. 51-52). That same day, the Companies and Ugaste made a signed written offer to the Union containing the terms demanded by the drivers at the meeting on June 29 (*i.e.*, a commission rate of 43.5 percent with no other change in the benefits), except for the requirement that drivers obtain a $100 bond (J. A. 278). This offer was tentatively accepted by the chief Union representative but was subsequently rejected by the drivers (J. A. 302, 239, 132).

On July 24, representatives of the Companies and the Union met. The drivers, through their attorneys, offered to return to work under the terms and conditions contained in the old collective bargaining agreement (J. A. 303; 81-82). The Companies refused to reinstate them on these terms. On September 9, the Union repeated the offer of July 24 to return to work (J. A. 279, 280). Again, the Companies refused to accept the offer (J. A. 281).

On the basis of the foregoing facts, the National Labor Relations Board (hereinafter referred to as the "Board") found that the totality of the Companies' conduct constituted a violation of Section 8 (a) (5) (J. A. 307-310). In addition, the Board found that the Companies violated Section 8 (a) (5) by unilaterally reducing the meter rates (J. A. 308), by unilaterally subcontracting the driving of the cabs to independent contractors (J. A. 308-309), and by terminating the current collective bargaining agreements without notifying the appropriate federal and state agencies (J. A. 304-306). The Board further found that the Companies violated Sections 8 (a) (3) and 8 (a) (1) of the Act by terminating the employment relationship of their commission drivers on July 1, 1963 with the specific intent of eliminating the Union as the bargaining representative and discouraging union membership (J. A. 326). Finally, the Board found that the Companies violated Section 8 (a) (1) of the Act by threats, promises of benefits, and

other acts of interference, restraint and coercion (J. A. 311-315).

The Board's order requires the Companies to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Act (J. A. 319-321, 327-328). Affirmatively, the Board ordered the Companies to bargain in good faith with the Union; to "resume their taxicab operations as conducted prior to July 1, 1963" (J. A. 320); "to cancel all lease arrangements with drivers and to give effect to the contract which [they] sought to terminate until such time as said contract may lawfully be terminated . . . pursuant to the provisions of Section 8(d)" (J. A. 327-328); to offer reinstatement to the drivers with back pay (J. A. 320); and to post appropriate notices (J. A. 321; 329).

The Court of Appeals affirmed all of the Board's findings and enforced the Board's order in its entirety. On March 2, 1967, the court of appeals denied the Companies' petition for rehearing.

REASONS FOR GRANTING THE WRIT.

1. In enforcing that part of the Board's order requiring the Companies "to give effect to the contract which [they] sought to terminate until such time as said contract may lawfully be terminated . . . pursuant to the provisions of Section 8(d)" (J. A. 327-328), the decision of the court below in the instant case is in direct conflict with the decision of the Fifth Circuit Court of Appeals in *National Labor Relations Board* v. *Light Boat Storage, Inc.* (not yet officially reported), 64 L. R. R. M. 2457 (5th Cir. 1967), *modifying* 153 N. L. R. B. 1209 (1965).

In the *Light Boat Storage* case, the collective bargaining agreement terminated by its terms on March 1, 1965. The

notice required by Section 8(d) of the Act was never given (153 N. L. R. B. at 1219). Finding that the company had violated Section 8(a)(5) of the Act, the Board ordered it to "reactivate, acknowledge the validity of, and abide by the terms of the collective bargaining contract. . . ." (153 N. L. R. B. at 1222). The Fifth Circuit Court of Appeals refused to enforce this portion of the Board's order, stating:

> Ordering compliance with an expired contract is much like ordering a party to sign a contract upon which full agreement has not been reached. At the very least, such an order disregards the parties' agreement concerning the duration of their commitment. And it certainly cannot be presumed that in changing economic circumstances the parties would agree on an identical renewal contract. 64 L. R. R. M. 2462.

The facts on this point in the instant case are almost identical to those in the *Light Boat Storage* case. The contract was terminated *by its own terms,* pursuant to Article XXI (J. A. 257), by virtue of the Companies' written notification to the Union of their intent to terminate the agreements (J. A. 290-291, 297, 298, 29, 105-106, 260, 261) and by virtue of the Union's written notice of its desire to amend the Agreement (J. A. 262, 263). The fact that Section 8(d) was not complied with does not distinguish the instant case from the *Light Boat Storage* case, since there was no compliance with Section 8(d) there. See 153 N. L. R. B. at 1219. Moreover, it is well established that "the failure to give timely notice to federal and state agencies [does] not have the effect of extending the period of the expired contract." *Procter and Gamble Independent Union* v. *Procter and Gamble Manufacturing Company,* 312 F. 2d 181, 189 (2d Cir. 1962) *certiorari denied,* 374 U. S. 830 (1963). See also *United States Gypsum Co.,* 90 N. L. R. B. 964, 968 n. 11 (1950); *International Harvester Company,* 77 N. L. R. B. 242, 243 (1948).

The issue of the Board's power to order the parties to a collective bargaining agreement to continue to give effect to it after they have terminated it raises important problems of a statutory and even constitutional dimension since such an order imposes an involuntary agreement upon the parties. See *In re Eisner*, 191 Misc. 662, 666, 77 N. Y. S. 2d 676, 679 (1948), *appeal dismissed*, 84 N. Y. S. 2d 698 (1948). Moreover, as the Court of Appeals for the Fifth Circuit observed, "the cases dealing with the employer's duty to take affirmative action to remedy his prior violation of Section 8(a)(5) have not been at all consistent." 64 L. R. R. M. 2462.

2. The Board's finding that the Companies violated Section 8(a)(5) of the Act by unilaterally reducing meter rates from forty to thirty cents per mile constitutes an unprecedented and unwarranted intrusion by the Board into an area—pricing policies—traditionally reserved to management and clearly outside the scope of matters committed by law to collective bargaining. To force taxi companies to bargain with their drivers as to the rates to be charged to customers is no different than forcing insurance companies to bargain with their commission agents as to the amount of life insurance premiums. Like the type of product to be produced or the location of plants, price policies have been universally understood to be within the exclusive control of management. See Cox and Dunlop, "Regulation of Collective Bargaining by the National Labor Relations Board," 63 *Harv. L. Rev.* 389, 401 (1950).

While decisions with respect to pricing policies have an important impact on employees whose pay is in part calculated on a commission basis, so do:

> Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales . . . . Yet it is hardly conceivable that such decisions so involve "conditions of employment"

that they must be negotiated with the employees' bargaining representative.[3] *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203 at 223 (1964). (Concurring opinion of Mr. Justice Stewart.)

Neither the Labor Board nor the court below has cited any cases in which a unilateral change in the price of the goods sold has been held to violate Section 8(a)(5).

This finding of the Board is of considerable practical importance both to the Petitioners and to employers generally, for the Trial Examiner's order, adopted on this point by the Board, directed the Companies to cease and desist "from making unilateral changes in the terms and conditions of employment without consulting the designated bargaining agent." (J. A. 316.) Therefore, unless the Board's finding on this point is reversed, the Companies will be forced to bargain with the Union about all future changes in meter rates. Moreover, in ordering the Companies to "resume their taxicab operations as conducted prior to July 1, 1963" (J. A. 320), the Board would seem to be ordering the Companies to increase meter rates back to the 40 cent level. It is no exaggeration to say that this constitutes a kind of price control totally without foundation in the Act. Unless reversed, a most dangerous precedent would be established.

3. The court of appeals' enforcement of the Board's order requiring that certain individuals be reinstated and made whole for any loss of pay rested upon its affirmance of the Board's finding that these individuals were constructively discharged, an affirmance that was based upon a determination that the Board's finding was supported by substantial evidence. It is believed that the affirmance on this basis was erroneous since the question of the status of

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3. It would seem that the decision concerning meter rates is a "sales" decision since it involves the price of the single service which the Companies have been marketing.

these individuals after the inception of the work stoppage could be resolved only by reference to appropriate legal principles. There was little, if any, dispute as to the facts. Rather, the sole issue presented was whether, given these facts, the Board's ascription of a particular legal status to the individuals involved was correct. It is believed that the substantial evidence test is not the proper basis for the resolution of this question since the question is one of "law" rather than "fact." See Jaffe, *Judicial Control of Administrative Action*, 548 (1965).

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

THE UNITED STATES COURT OF APPEALS
for the
District of Columbia Circuit.

No. 20110.

GENERAL TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 782, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Petitioner*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 20148.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

BLUE CAB COMPANY AND VILLAGE CAB COMPANY, *Respondents*.

No. 20253.

BLUE CAB COMPANY AND VILLAGE CAB COMPANY, *Petitioners*,

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

ON PETITIONS TO REVIEW AND ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

February 7, 1967.

Sheldon M. Charone, with whom *Herbert S. Thatcher* was on the brief, for petitioner in No. 20110 and intervenor in No. 20148. *David S. Barr* also entered an appearance for intervenor in No. 20148.

Hans J. Lehmann, with whom *Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Elliott Moore,* were on the brief for petitioner in No. 20148 and respondent in Nos. 20110 and 20253.

Richard L. Marcus, with whom *Charles L. Bucy* was on the brief, for petitioners in No. 20253 and respondents in No. 20148.

Before PRETTYMAN, *Senior Circuit Judge* and TAMM and ROBINSON, *Circuit Judges.*

TAMM, *Circuit Judge*:—These are three labor relations cases. The National Labor Relations Board, after proper proceedings, held that the Blue Cab Company and the Village Cab Company had violated Sections 8 (a)(1), (3) and (5) of the National Labor Relations Act.[1]

In case No. 20,110, the Union, General Teamsters, Chauffeurs and Helpers, Chauffeurs, Warehousemen and Helpers of America, seeks reversal of the Board's action on several grounds. The Union alleges that the Board erred in its refusal to permit an inspection of the employers' financial records and in its ruling that it was unnecessary to decide whether the employers had refused to bargain with respect to severance pay and a demand for a drivers' damage bond.

In case No. 20,253, Blue Cab Company and Village Cab Company, the employers in the labor dispute, challenge the correctness of the Board's rulings that they the employers:

---

1. National Labor Relations Act, as amended, 61 Stat. 136, 13 Stat. 519, 29 U. S. C. § 158(a)(1), (3), (5). See Appendix.

1. Violated Section 8(a)(1) of the Act by threatening employees with reprisals and promising them benefits to induce them to abandon representation by the Union.

2. Violated Sections 8(a)(1), (3) and (5) of the Act by discharging their driver-employees and thereafter requiring drivers to execute a lease agreement, purportedly as independent contractors, in order to avoid bargaining with the Union.

3. Further violated Sections 8(a)(1) and (5) of the Act by reducing employees' compensation; by introducing a different system of payments without notifying and consulting with the Union; and by terminating its collective bargaining agreement without notifying federal and state agencies, as required by Sections 8(d) (3) and (4) of the Act.

The companies also challenge, generally, the validity and propriety of the Board's order.

In case No. 20,148 the National Labor Relations Board petitions for enforcement of its order which, in substance, calls upon the Blue Cab and Village Cab companies to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Act. The Board's order further requires the cab companies to bargain in good faith with the Union; to resume taxicab operations as they were conducted prior to July 1, 1963 (the date of the termination of the prior labor contract); to cancel lease arrangements made with drivers; to reinstate, and to continue to operate under the terms of, the labor agreements in effect on June 30, 1963, until such time as they may be lawfully terminated pursuant to the provision of Section 8(d) of the Act; to offer reinstatement to discharged drivers, with back pay; and to post appropriate notices.

II. The Board had before it as the basis for its decision a great volume of evidence. The trial examiner had heard the testimony of more than twenty witnesses, and this transcribed testimony produced a record exceeding seven hundred pages. A number of exhibits supplemented the oral testimony. Our careful review of the entire record and the Board's order convinces us that the Board's decision is supported by substantial evidence on the record considered as a whole and that the relevant evidence was such that a reasonable mind might accept it as adequate to support the Board's conclusions. *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board,* 301 U. S. 142 (1937); *Consolidated Edison Co. et al.* v. *National Labor Relations Board,* 305 U. S. 197 (1938).

Additionally, the proceedings before the examiner and the Board fulfilled all procedural requirements. The Board accepted with some modification the examiner's findings, conclusions, and recommendations. In those instances where its conclusions differ from those of the examiner, we are satisfied that they were proper and within the orbit of the Board's authority to reach differing conclusions from those of the hearing examiner. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 492. Four Board members as "experts devoting their whole skill in labor management problems, unanimously and realistically considered the entire record"[2] and in their dutiful administration of the Act reached their decision accordingly.

This court must give appropriate consideration to the broad expertise of the Board:

> "Everyday experience in the administration of the statute gives if familiarity with the circumstances and

2. *Warehousemen and Mail Order Employees Local No. 743* v. *National Labor Relations Board,* 112 U. S. App. D. C. 280, 302 F. 2d 865, 869 (1962).

backgrounds of employment relationship in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers." *National Labor Relations Board* v. *Hearst Publications Inc.*, 322 U. S. 111, 130 (1944).

Our reviewing power is further restricted:

"We have repeatedly held that Congress, by providing [in] § 10(c) (e) and (f) of the National Labor Relations Act, that the Board's findings 'as to the facts, if supported by the evidence, shall be conclusive,' precludes the courts from weighing evidence in reviewing the Board's orders, and if the findings of the Board are supported by evidence, the courts are not free to set them aside, even though the Board could have drawn different inferences." *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105 (1942).

This limitation on and of court review of decisions of administrative agencies has been reviewed, restated, and re-emphasized by the Supreme Court during the past year. See *Consolo* v. *Federal Maritime Commission*, 383 U. S. 607, 623 (1966).

Since we find that the Board's action is supported by substantial evidence and since the record is completely devoid of any indication of arbitrary or capricious conduct and reflects no abuse of discretion, we affirm the Board's action in its entirety. The petitions for review are denied. The Board's order will be enforced in full.

It is so orderd.

§ 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same

terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title.

DECREE.

Before: PRETTYMAN, *Senior Circuit Judge,* TAMM and ROBINSON, *Circuit Judges.*

THESE CAUSES were submitted to this Court upon petitions to review, and a petition for enforcement of an order of the National Labor Relations Board, dated December 30, 1965, against Blue Cab Company and Village Cab Company, their officers, agents, successors, and assigns. The Court heard argument of respective counsel on December 23, 1966, and has considered the briefs and transcript of record filed in these causes. On February 7, 1967, the Court being fully advised in the premises, handed down its opinion denying the petitions to review and granting enforcement of the Board's order and entered judgment accordingly.

On consideration whereof, it is ORDERED, ADJUDGED and DECREED by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Blue Cab Company and Village Cab Company, their officers, agents, successors, and assigns

abide by and perform the directions of the Board in said order contained.

.....,

Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

.....,

Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

.....,

Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

UNITED STATES COURT OF APPEALS,
for the District of Columbia Circuit.

SEPTEMBER TERM, 1966.

No. 20148.

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

BLUE CAB COMPANY AND VILLAGE CAB COMPANY, *Respondents.*

GENERAL TEAMSTERS, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 782, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA. *Intervenor,*

No. 20253.

BLUE CAB COMPANY AND VILLAGE CAB COMPANY, *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

Before: PRETTYMAN, *Senior Circuit Judge*; and TAMM and ROBINSON, *Circuit Judges,* in Chambers.

ORDER.

On consideration of the petition for rehearing filed by Blue Cab Company and Village Cab Company, it is

ORDERED by the court that the aforesaid petition is denied.

PER CURIAM.

DECREE.

Before: PRETTYMAN, *Senior Circuit Judge,* TAMM and ROBINSON, *Circuit Judges.*

THESE CAUSES were submitted to this Court upon petitions to review, and a petition for enforcement of an order of the National Labor Relations Board, dated December 30, 1965, against Blue Cab Company and Village Cab Company, their officers, agents, successors, and assigns. The Court heard argument of respective counsel on December 23, 1966, and has considered the briefs and transcript of record filed in these causes. On February 7, 1967, the Court being fully advised in the premises, handed down its opinion denying the petitions to review and granting enforcement of the Board's order and entered judgment accordingly.

On consideration whereof, it is ORDERED, ADJUDGED and DECREED by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Blue Cab Company and Village Cab Company, their officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

/s/ E. BARRETT PRETTYMAN,
Senior Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

/s/ EDWARD ALLEN TAMM,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

/s/ SPOTTSWOOD W. ROBINSON, III,
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit.

APPENDIX B.

The relevant provisions of the Labor-Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

29 U. S. C. § 158 (a) (1), (3), (5):

"Sec. 8.(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization . . .;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

29 U. S. C. § 158 (d):

"Sec. 158 (d) For the purposes of this section, to bargain collectively in the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Concilation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * * * *

Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 200

BLUE CAB COMPANY AND VILLAGE CAB COMPANY,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 11–18) is reported at 373 F. 2d 661. The Board's Decision and Order (J.A. 284–329)[1] are reported at 156 NLRB 489.

JURISDICTION

The decision of the court of appeals was issued on February 7, 1967 (Pet. 11). A petition for rehearing was denied on March 2, 1967, and the decree was entered the next day (Pet. 19, 20). The petition for a writ of certiorari was filed on May 26, 1967. The juris-

[1] "J.A." refers to the Joint Appendix in the court below.

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The National Labor Relations Board found that a taxicab company violated its bargaining obligation under the National Labor Relations Act by terminating the labor agreement which it had with the drivers' union without giving the notices to the federal and state mediation services required by Section 8(d) of the Act, and adopting a new lease arrangement without bargaining with the union. The following questions are presented:

1. Whether the Board, as a remedy for these unfair labor practices, properly ordered the company to cancel the lease arrangement and to reinstate, and continue to operate under, the former labor agreement until such time as it may be terminated by either party in accordance with Section 8(d).

2. Whether, where the drivers are paid a percentage of the fares they collect, the amount of such fares is a mandatory subject of collective bargaining.

3. Whether substantial evidence supports the Board's finding that the taxicab company discriminated against its drivers, in violation of the Act, by offering them employment under lease arrangements provided they renounced representation by the union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pp. 21-22 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. THE INITIAL REFUSAL TO BARGAIN

Petitioners ("the Companies") are a single integrated enterprise engaged in the operation of taxicabs in the Village of Oak Park and other suburbs of Chicago (J.A. 284–285; 20–21, 41–42, 247–250). The Companies have had a succession of substantially identical collective bargaining agreements with the Union[2] for about 11 years (J.A. 290, 297; 128). In January 1963, the Companies wrote the Union that they wished to terminate the current agreements on June 30, 1963, when the contracts were subject to amendment or termination (J.A. 290–291, 297–298; 29, 105–106, 260, 261). On April 23, the Union wrote the Companies that it wanted to change the agreements and asked the Companies to meet for negotiations. On April 29, the Companies replied that they intended to terminate the agreements on June 30 (J.A. 298; 106, 262–263, 268). The Companies never notified the Federal Mediation and Conciliation Service or the Department of Labor of the State of Illinois of their intention to terminate, as Section 8(d) of the Act requires (J.A. 304; 30, 108, 119–121, 243–244).[3]

About the middle of May, Union Business Agent

---

[2] General Teamsters, Chauffeurs and Helpers Local Union No. 782, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[3] The Department is the Illinois agency "established to mediate and conciliate disputes" within the meaning of Section 8(d)(3) of the Act. J.A. 305, n. 12; see also *Local 156, United Packinghouse Workers, et al.*, 117 NLRB 670, 672, 679.

Baggott repeated the request for a meeting to discuss contract terms. Charles Ugaste, the Companies' principal officer and the person who handled their labor relations, stated that he was not bargaining because he intended to start a cab-leasing business and would have no employees after June 30. Ugaste rejected Baggott's offer to look at agreements between the Union and other cab companies that operated with driver-lessees, adding that "after July there would be no union employees." (J.A. 298, 326; 31–32, 36, 106–107, 134).

On May 27, the Union wrote the Federal Mediation and Conciliation Service that it had an unresolved dispute with the Companies (J.A. 299; 108, 276–277). When a commissioner of the Federal Service called the parties to a meeting in his office on June 24, the Companies refused to participate in any negotiations on the ground that they were not engaged in interstate commerce. After the meeting was recessed to another location, the Companies' attorney told the Union representatives that there was no reason for the Companies to be present, because they would have no employees after July 1, 1963 (J.A. 299, 305; 74–78, 122–123).

At a meeting between Ugaste and Baggott held late in June, Ugaste proposed that in any new contract the commission of the drivers be reduced from the then 47.5 percent of the fares collected to 42.5 percent, and that the drivers be required to furnish a $100 accident bond. At the same time, Ugaste announced that the Companies planned to reduce their fares from 40 to

30 cents per mile. (J.A. 300; 51, 124, 133.) When Baggott pointed out that these measures would reduce the drivers' earnings by 30 percent, Ugaste replied: "I don't know why I made this offer. I don't want the Union or any part of it and would never sign a contract with the Union" (J.A. 301; 124, 230).

On June 28, the Oak Park Chief of Police arranged for a meeting between Ugaste and several union drivers. Ugaste offered them on "a take it or leave it basis" a commission rate of 42.5 per cent, coupled with a $100 accident bond to be furnished by the employees. When the drivers asked for a smaller reduction in the rate and the elimination of the bond, Ugaste refused and stated: "As of midnight Sunday no more cab company. You fellows are no more union. I'm not having any more union contract. You are no more employees as of Sunday midnight. If you want to work come with me working on a leasing basis, 50–50, that's it." (J.A. 301, 326–327; 96–99, 101, 125.)

On July 1, Ugaste gave Baggott a written proposal providing for a reduction in the commission rate from 47.5 to 42.5 percent, and for the $100 accident bond (J.A. 301–302; 125–126, 236, 278). The members of the Union voted to reject the offer, and they started picketing the Companies' premises (J.A. 302; 132).

2. THE DISCHARGE OF THE DRIVERS AND THE CONTINUED REFUSAL TO DEAL WITH THE UNION

Beginning July 1, the Companies started to operate under an "Independent Contractor Lease Rental Agreement." All drivers on the payrolls on July 1 were given an opportunity to sign leases for their

cabs; those who did not were offered no further employment. (J.A. 291–292.) Under the lease agreement, the driver received 50 percent of the gross fares and was required to purchase his own gasoline. He received none of the benefits provided in the prior labor agreements with the Union, such as vacations and contributions to the Union's health and welfare fund. (J.A. 292, 325–326; 33–35, 251–257, 264–267.) In conjunction with adopting the lease arrangement, the Companies, as of July 1, reduced the fare per mile from 40 to 30 cents (J.A. 294).

When negotiations between the Union and the Companies were resumed on July 24, the Companies' attorney stated that he was present only to negotiate about the Companies' going out of business, which had occurred on July 1. He admitted, however, that the Companies were advertising for drivers on a lease basis. (J.A. 302–303; 79–80, 85, 127). When the Union offered to have all drivers return to work, the Companies' attorney replied that the Companies were not employing any drivers (J.A. 303, 81–82). In September 1963, the Union again offered to have all drivers return to work. The Companies' attorney replied that the drivers' employment had been terminated as of June 30, 1963, and that any of "our former employees * * * who qualify may lease cars from us as independent contractors" (J.A. 304; 127, 279–280).

3. THE INTERFERENCE, RESTRAINT AND COERCION

Beginning on June 27, Ugaste told several drivers that there would be no union contract at any time, and that there "never would be another union in

here" (J.A. 313–314; 55, 64, 102–103, 227). Other supervisory employees similarly told individual drivers that there would be no more union drivers after July 1 and no more union contract; and that the drivers would have to take out a withdrawal card from the Union if they wanted to continue working. (J.A. 311; 43, 45, 92–93, 199–202.) After the picketing began, drivers Pope and Rozmus were told by supervisory employees that, if they came back to work, they could keep all fares received and the Companies would buy the gas (J.A. 312, 313; 62, 68–69, 211–212).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that the Companies had reduced their employees' compensation and introduced a different system of payment without first notifying and bargaining with the Union, and that they had terminated the collective bargaining agreements without notifying the federal and state agencies as provided in Section 8(d)(3) of the Act (J.A. 304–306, 308–309, 325). The Board concluded that, by these acts as well as by their overall conduct, the Companies failed to bargain with the Union in good faith, and thus violated Section 8(a)(5) (J.A. 305–306, 308–309, 310, 325). The Board further found that the Companies violated Section 8(a)(3) and (1) by discharging their drivers and conditioning reemployment under a lease arrangement upon their withdrawal from the Union (J.A. 326–327). Finally, the Board found that the Companies violated Section 8(a)(1) by threats and promises of benefits to the drivers in order to induce them to abandon the Union (J.A. 311–315).

The Board's order requires the Companies to cease and desist from the unfair labor practices found; to bargain in good faith with the Union; to resume their taxicab operations as conducted prior to July 1, 1963; to cancel any lease agreements with the drivers, and to reinstate, and continue to operate under, the labor agreements in effect on July 1, 1963, until such time as they may lawfully be terminated pursuant to Section 8(d); to offer reinstatement to the discharged drivers with back pay; and to post notices (J.A. 319–321, 328–329).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals held that the Board's findings were supported by substantial evidence and enforced the Board's order in full (Pet. 11–15).

ARGUMENT

The decision of the court below is correct, and turns on the facts of this particular case. There is no occasion for further review.

1. The Companies do not here attack the findings of the Board, affirmed by the court below, that they terminated the existing labor agreements with the Union without serving notice on the federal and state mediation services as required by Section 8(d)(3) of the Act;[4] and that they entered into lease agreements

[4] In relevant part, Section 8(d) provides that, where there is in effect a collective bargaining contract, "the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

* * * * * * *

(3) notifies the Federal Mediation and Conciliation Serv-

with the drivers which substantially altered terms and conditions of employment without bargaining with the Union. Their sole contention (Pet. 6–8) is that the Board lacked statutory authority to remedy these clear violations of the duty to bargain collectively by requiring the Companies to cancel the leases and resume operations under the old agreements until such time as they may be terminated by either party in accordance with Section 8(d). There is no merit to this contention.

It is settled that the broad grant of remedial authority which Section 10(c)[5] confers upon the Board encompasses remedies that achieve "a restoration of the situation, as nearly as possible, to that which would have obtained but for [the unfair labor practices]." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 194; *National Labor Relations Board* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 348; *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 216. Where, as here, the unfair labor practice consists of the unlawful termination of an existing labor agreement and the unlawful substitution of another arrangement, the *status quo ante* can be most nearly recreated only by requiring, as the Board did, that the new arrangement be

---

ice within thirty days after such notice [the 60-day notice of termination or modification specified in subsection (1)] of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred * * *."

[5] Section 10(c) empowers the Board to order "such affirmative action * * * as will effectuate the policies of this Act."

cancelled and that the parties resume operations under the old agreement, at least until such time as it may be terminated in accordance with the statutory procedures.[6] This remedy does not involve the Board in writing a contract for the parties; the remedy accepts the contract written by the parties and merely requires that they continue giving effect to it pending compliance with the statutory requirements for good faith collective bargaining.

Contrary to petitioners' contention (Pet. 6–7), the decision below does not conflict with *National Labor Relations Board* v. *Light Boat Storage, Inc.*, 373 F. 2d 762 (C.A. 5). Although the court there stated that the Board lacked power to order an employer, who had unlawfully repudiated a contract during its term, to give effect to that contract beyond the time when it would ordinarily have expired, the actual holding was much narrower. Noting that the Board's order was ambiguous as to whether it applied beyond the period after which the contract would have expired, the court "interpret[ed] it not to apply to such periods, and as so interpreted, enforce[d] the order" (373 F. 2d at 767). The court expressly stated (p. 767) that it was "limiting our decision to the facts of this case."

Nor are petitioners aided by *Proctor & Gamble Independent Union* v. *Proctor & Gamble Manufac-*

[6] See *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 215–217; *National Labor Relations Board* v. *Central Illinois Public Service Co.*, 324 F. 2d 916, 919 (C.A. 7); *National Labor Relations Board* v. *Gene Hyde*, 339 F. 2d 568 (C.A. 9); *National Labor Relations Board* v. *Warrensburg Board & Paper Corp.*, 340 F. 2d 920, 922–923 (C.A. 2).

turing Co., 312 F. 2d 181 (C.A. 2), certiorari denied, 374 U.S. 830. There the court dismissed a suit under Section 301 of the Labor Management Relations Act to compel grievance arbitration, on the ground that the contract had expired. In so doing, it rejected the union's contention that the contract automatically had been extended because of the union's failure to give the notices required by Section 8(d)(3) of the National Labor Relations Act. However, the court acknowledged that such failure "is an unfair labor practice which the Board may redress by a proper order," and that "remedies for unfair labor practices under Section 8(d) are exclusively the province of the Board" (312 F. 2d at 188–189).

2. There is likewise no substance to petitioners' contention (Pet. 8–9) that the Board has impermissibly extended the area of mandatory bargaining under the Act in requiring the Companies to bargain with the Union over the fare or meter rate of their cabs. Where, as here, the employees' method of compensation is directly geared to the rates charged by the employer,[7] the employees have a sufficient interest in the latter to make it a matter "suitable for resolution within the collective bargaining framework." *Fibreboard Paper Products Corp* v. *National Labor Relations Board*, 379 U.S. 203, 213–214; cf. *Local 24, Teamsters Union* v. *Oliver*, 358 U.S. 283. It is not the

[7] As shown (*supra*, pp. 4–5), the drivers were paid a percentage of the fares collected. The Companies' proposal to reduce the drivers' percentage from 47.5 to 42.5 percent, and the fare rate from 40 to 30 cents per mile, would reduce the drivers' earnings by 30 percent.

label which an employer puts on his action, such as "change in the price of the goods sold" (Pet. 9), but "the impact of the employer's unilateral decisions on the employee unit involved" (*District 50, United Mine Workers* v. *National Labor Relations Board,* 358 F. 2d 234, 236 (C.A. 4)), which determines whether the action is subject to bargaining under the Act. Cf. *Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676, 689–690 (opinion of Mr. Justice White).

3. Finally, contrary to petitioners' contention (Pet. 9-10), the question whether the drivers were constructively discharged by the Companies presents only a substantial evidence question, which does not warrant review by this Court. Moreover, the facts summarized in the Statement (*supra,* pp. 4–6) fully support the Board's finding that the Companies gave the drivers' the choice of continuing to work only if they accepted the illegal condition of working under the new lease arrangement and rejecting the Union.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 200

BLUE CAB COMPANY AND VILLAGE CAB COMPANY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENT LOCAL 782, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the court of appeals is not yet officially reported, but is printed in Appendix A of the Petition. The Board's decision and order (J. A. 284-329) is reported at 156 N. L. R. B. 489.

JURISDICTION.

Petitioner adequately describes the jurisdictional requisites.

QUESTIONS PRESENTED.

The questions presented by petitioners do not fully and sufficiently describe the issues. The questions more adequately formed would be:

Whether the National Labor Relations Board has the power to require a party who has not complied with the notice requirements of Section 8(d)(3) of the Act to continue to give effect to the contract until such requirements have been satisfied.

Whether it is a refusal to bargain collectively, in violation of Section 8(a)(5) of the National Labor Relations Act, for an employer to unilaterally change the meter rate when the compensation of its employees is based primarily upon a percentage of such rate.

Whether the court of appeals correctly applied the "substantial evidence" test in affirming the Board's finding that employees who were discharged were entitled to reinstatement and back pay.

STATUTE INVOLVED.

Except for Section 160(e) which is set forth in Appendix A, infra, p. 11, the other relevant statutory provisions are set forth in the Petition.

STATEMENT.

Petitioners' statement generally sets forth the relevant facts. Respondent Local 782, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America intervened in Case No. 20,148, in which the court enforced the Board's order in its entirety.

It should be emphasized that the overall activities of petitioners evidenced a comprehensive plan to destroy the union's majority status (J. A. 326).

The Board found that petitioners violated Section 8(a)(1) of the Act by:

(1) promising the employees benefits such as greater compensation as driver-lessees and continued hospital insurance if they would discontinue their union adherance;

(2) threatening to close the business before they would sign another union contract;

(3) expressing an intention to get rid of the union and threatening employees with discharge or other reprisals if they continued their union adherance; and

(4) offering economic benefits to those on the picket line and soliciting their return to work (J. A. 315, 325).

The *in toto* violation of Section 8(a)(5) found by the Board included:

(1) unilaterally changing the existing wage structure of its drivers;

(2) bargaining directly with the employees with regard to the proposed driver-lessee agreements;

(3) refusing to negotiate and discuss with the union the driver-lessee arrangements and other terms and conditions of employment; and

(4) refusing to bargain in good faith within the meaning of Section 8(d) and 8(a)(5) (J. A. 315, 325).

Finally the Board held that petitioners violated Section 8(a)(3) by "clearly demonstrating that [their] action had as its specific intent the permanent severence of the employment relationship with the elimination of the union as the bargaining representative and the discouragement of union membership" (J. A. 326).

Based on the above finding the Board issued its traditional order to remedy the massive unfair labor practices which were committed by petitioners.

ARGUMENT.

This Court is asked to review a refusal to bargain order of the Board which was enforced by the Court of Appeals for the District of Columbia in a unanimous decision. The case involved a routine attempt to destroy the union's majority accompanied by threats, discharge of the employees when the threats became ineffective and termination of the contract without complying with the notice requirements of Section 8(d). The case is not novel and represents only a routine application of well settled Board principles. Petitioners' reasons for granting the Writ will be discussed below.

1) There is no conflict in the circuits.

Petitioners contend that the decision of the Fifth Circuit Court of Appeals in *National Labor Relations Board* v. *Light Boat Storage, Inc.*, 64 L. R. R. M. 2457 (1967) (not yet officially reported) in which the Board's order in 153 NLRB 1209 (1965) was modified is "in direct conflict with the Board's order in the instant case."

In *Blue and Village Cab,* the General Counsel charged in his complaint that petitioners had violated Section 8(a)(5) by failing to notify Federal Mediation and Conciliation Service and the appropriate State agency of the existence of a dispute. The Board in agreement found that petitioners had not served notices (J. A. 304, 30, 242-244) and ordered them to reinstate and operate under their contract in effect on June 30, 1963, until such time as that contract may lawfully be terminated by giving the appropriate notice to Federal Mediation and to the appropriate State agency as required by Section 8(d)(3) of the Act (J. A. 327-328).

The Board's decision in *Light Boat* was not predicated upon a violation of Section 8(d)(3). The Board never considered the requirements of Section 8(d)(3) and specifically overruled the trial examiner's reference to 8(d) with the comment: "In agreeing that the Respondent violated Section 8(a)(1) and (5) of the Act as alleged, we find it unnecessary to consider or pass upon the trial Examiner's dictum as to the requirement of mid-term notice under Section 8(d)." 153 NLRB 1209.

Petitioners' statement that "the facts on this point in the instant case are almost identical to those in the *Light* Boat Storage Case" is of no significance. What is significant is that the issue of an 8(d) violation was neither charged, litigated nor decided by the Board in *Light Boat*. The rationale of the Fifth Circuit in *Light Boat* is similarly of no help to petitioners. The basis for the Fifth Circuit's decision was its conclusion that "the Board is not competent to interpret contractual provisions or adjudicate contractual disputes". Amplifying its reasoning, the court stated:

> "The Board may order an employer to sign an agreement or even to 'honor' a contract. This distinction explains the *Hyde* distinction that the Board may order the company 'to honor' but may not order the company to comply with the contract; In the *Hyde* sense 'compliance' means the act of carrying out the various provisions of the contract and would require the Board to determine when performance was satisfactory. 'Honor' means the respect due to a contract by a party to the contract, leaving disputes over the meaning of the contract's terms to a court or an arbitrator."

Thus the Fifth Circuit's refusal to enforce the Board's order was solely on the basis that the Board was not competent to interpret contractual language. In sharp distinction, the order under review is predicated only upon the

failure to comply with Section 8(d). The District of Columbia Circuit has not "plunged into the thicket of contract interpretation" which worried the Fifth Circuit. Requiring compliance with the notice-requirement of Section 8(d) does not involve contract interpretation but a mere determination of whether the parties have complied with the statutory requirements. Failure to give 8(d) notice is a violation of the Act which the Board, not arbitrators, has the duty to cure.

We submit, that the decision in *Light Boat* is inapposite.

2) Since petitioners did not urge before the Board its contention that reduction of meter rates is a pricing decision outside of the scope of collective bargaining, it is precluded by § 160(c) from raising that issue before this Court.

In its exception No. 13(b), respondents excepted to the trial examiners finding that they violated Section 8(a)(5) by reducing meter rates: "The reduction in meter rates (T. E., p. 15, lines 13-20) was not made by the respondents until the union began picketing on July 1, 1963, which was after the expiration of the contract".

We submit that the pricing aspect of the problem is not now properly before the Court.

> "The company never made before the Board the objection it now bases on the seasonal nature of the business. Section 10(e) of the Act, 61 Stat. 136, 147, 148, 29 USC (Supp. IV) § 160(c) provides: 'No objection that has not been urged before the Board, its members or agents, or agency, shall be considered by the court, unless the failure or neglect to urge such contention shall be excused because of extraordinary circumstances . . . No extraordinary circumstances are present such as would justify permitting the issue to be raised here for the first time.'" *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 345, 350 (1952).

In any event the unilateral decreases in the meter rate had a substantial effect on the commission earnings of the drivers. The fare rate can not be compared to the sale price of a product since the latter is subject to day by day fluctuations resulting from supply and demand while the meter rate is relatively permanent and only changed after prior approval by the municipal regulatory agency. Meter rates are more comparable to public utility rates; prices are not under the sole control of management. It is apparent that in connection with petitioners' galaxy of unfair labor practices, that the unilateral reduction of fare rates was further evidence of a desire not to bargain in good faith. This Court has held that "Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining contrary to congressional policy. *NLRB* v. *Katz*, 369 U. S. 736, 747 (1962).

3) The Board in finding that petitioners had discharged the employees ordered that they be reinstated with back pay. The District of Columbia Circuit in enforcing the Board's order agreed not only with the Board's factual determination that the employees were discharged but with the Board's remedy. The court's conclusion that "the Board's action is supported by substantial evidence" was a correct statement of its reviewing authority.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

29 U. S. C. § 160(e):

"Sec. 160(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or

agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.[1]

1. Section 160(f) which applies to aggrieved parties incorporates by reference the requirements of 160(e).

SEP 18 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 200

BLUE CAB COMPANY AND VILLAGE CAB COMPANY,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF OF PETITIONER.

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ARGUMENT.

This Reply Brief is filed pursuant to Rule 24(4) of the Rules of the Supreme Court of the United States. Its scope is limited to responding to an argument not previously raised in the course of these proceedings, to wit, that Petitioners are seeking to raise an issue not properly raised before the Labor Board by objecting to the Board's finding that Petitioners' unilateral reduction in meter rates violated Section 8(a)(5) of the National Labor Relations Act as amended, 29 U. S. C. §§ 151, 159(a)(5). (Brief of Respondent Union, page 7).

In making this argument, the Union fails to note that in exception No. 21(7), Petitioners specifically excepted to

the Trial Examiner's finding "that by unilaterally changing the terms and conditions of employment of their driver-employees, Respondents* violated Section 8(a)(5) and (1) of the Act (T. E., p. 21, lines 1-4)." Similarly, in exception 20(b), Petitioners argued that "The Trial Examiner erred in recommending that the Respondents cease and desist from . . . making unilateral changes in the terms and conditions of employment without consulting the designated bargaining agent and that Respondents restore the status quo ante July 1, 1963 . . ." Clearly, these exceptions were specific enough "to apprise the Board that petitioner intended to press the question now presented." *Marshall Field & Company* v. *N. L. R. B.*, 318 U. S. 253, 255 (1943). See also *N. L. R. B.* v. *Seven-Up Bottling Co. of Miami*, 344 U. S. 345 (1953). Accordingly, this Court is not "precluded by § 160(c)" of the Act from considering the issue raised in the second part of the Petition (Brief of Respondent Union, pages 8-9).

Respectfully submitted,

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